U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 28 September 2004

BALCA Case No.: 2003-INA-263
ETA Case No.: P2001-CA-09512280/LA
In the Matter of:

GREEN ACRES GROUP HOME,
Employer,

on behalf of

CRISOSTOMO S. INALVEZ,
Alien.

Appearance: Evelyn Sineneng-Smith, Immigration Consultant
San Jose, California
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman, and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This matter arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien employment certification. Permanent alien employment certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On February 1, 2001, the Employer filed an application for alien employment certification on behalf of the Alien, Crisostomo S. Inalvez, to fill the position of Caregiver. (AF 115-116). The job duties included patient care for six developmentally disabled patients, as well as cleaning the home, preparing and serving meals, and doing laundry and other housekeeping tasks. Other special requirements included First Aid and CPR certification, and requirements to live on the premises and to be on call twenty-four hours per day. (AF 115).

On November 25 2002, the CO issued a Notice of Findings ("NOF"), proposing to deny certification based on the restrictive requirements of living on the premises and being on call twenty-four hours per day, as well as deficiencies in the employment contract and an unlawful combination of duties. (AF 109-112). The CO found that the duties in the Employer's job description did not match any single job description in the *Dictionary of Occupational Titles* ("DOT"), but rather covered a combination of duties performed in the positions of nurse assistant, laundry worker, and cook. The CO instructed the Employer to revise the job duties and to retest the labor market, to justify the combination of duties as a business necessity, or to present evidence that such employment is normal or customary. (AF 109-110). The CO also found the requirements to be on call twenty-four hours per day and to live on the premises to be unduly restrictive. The CO advised the Employer to delete these restrictive requirements and to retest the labor market or to justify the requirements based on business necessity. (AF 110-112).

On January 4, 2003, the CO granted the Employer an extension until January 30, 2003 to submit rebuttal. (AF 23). The Employer filed its rebuttal on January 30, 2003. (AF 25). However, the Employer failed to follow the CO's directions to choose one of the corrective options for the deficiencies regarding its restrictive combination of duties, restrictive requirement of being on call 24 hours per day, and restrictive live-in requirement. Instead, the Employer both justified and deleted these restrictive

requirements in its rebuttal. Therefore, the CO issued a supplemental NOF on April 18, 2003, giving the Employer another opportunity to correct its deficiencies. This second NOF stated that the Employer must act in accordance with the CO's initial instructions and choose only one corrective option for each of its restrictive deficiencies. The Employer was notified, in the April 18, 2003, NOF, that if it failed to submit its amended rebuttal by May 23, 2003, then the April 18, 2003, NOF would become the final decision of the Secretary and the Employer's application for alien employment certification would be denied. (AF 32-34).

The Employer, instead of submitting its amended rebuttal by May 23, 2003, submitted another request for an extension of time to send its responses. In the Final Determination, dated June 6, 2003, the CO denied the Employer's request for a second extension of time, explaining that the Employer was not faced with extenuating circumstances justifying a second extension, and that the Employer had only been required to designate which corrective option it chose to present for each of its restrictive deficiencies. Because the Employer failed to select one corrective option for each of its deficiencies, the CO issued a Final Determination on June 6, 2003, denying the Employer's application for alien employment certification based on the deficiencies. (AF 22-23).

DISCUSSION

Twenty C.F.R. § 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. An employer cannot impose a requirement that is abnormal for the occupation or not included in the *Dictionary of Occupational Titles* ("DOT") unless it establishes a business necessity for the requirement.

In order to show business necessity, an employer must first show that the requirement it imposes bears a reasonable relationship to the occupation in the context of the employer's business. Secondly, it must show that the requirement is essential to performing, in a reasonable manner, the job duties of the position as described by the

employer. *Information Industries, Inc.* 1988-INA-82 (Feb. 9, 1989)(*en banc*). Vague and incomplete rebuttal documentation will not meet an employer's burden to establish business necessity. *Analysts International Corp.,* 1990-INA-387 (July 30, 1991).

In this case, the CO identified as unduly restrictive the combination of duties for the Nurse Aide position and the requirements that the Nurse Aide be on call twenty-four hours per day and live on the premises. The CO proposed multiple options for the Employer to correct each of its deficiencies, but advised the Employer that in its rebuttal it should choose which option to use to cure. (AF 109-112). When the Employer submitted a rebuttal that presented multiple cures for each of its deficiencies, the CO rejected the rebuttal, and gave the Employer another opportunity to cure. (AF 32-34). The Employer asked for an extension of time, which the CO denied. The CO then issued a Final Determination explaining that because the Employer failed to limit its rebuttal to one method of curing the deficiencies, its application for alien employment certification was denied. (AF 22-23).

In *Ronald J. O'Mara,* 1996-INA-113 (Dec. 11, 1997)(*en banc*), the court affirmed the holding in *A. Smile,* 1989-INA-1 (Mar. 6, 1990), finding that when an employer attempts to justify the business necessity of a job requirement in its rebuttal, and also offers to modify its job requirement and re-advertise the job if the justification is not accepted, the employer must be afforded such an opportunity to re-advertise. *Ronald J. O'Mara*, *supra*. The court in *O'Mara* explained, however, that this opportunity to submit both a justification for business necessity and an offer to re-advertise is not available when: 1) the employer's offer to re-advertise is equivocal 2) there is no bona fide job opportunity 3) the employer unlawfully rejected qualified U.S. applicants or 4) the employer failed to use good faith in its recruitment efforts. *Id.*

In this case, the Employer attempted to justify the unduly restrictive job requirements and the unlawful combination of duties by business necessity, while at the same time offering to re-advertise if these justifications were not accepted. The Employer presented argument relating to the business necessity of the requirements, but

also stated that they wished to amend the ETA 750A to delete the requirements and included a draft advertisement. However, in the draft advertisement, the Employer retained the duties of serving meals and doing dishes, as well as the live-in requirement. (AF 66). Therefore, the offer to re-advertise was equivocal and did not cure the deficiency. The SNOF instructed the Employer that the rebuttal as presented was inconsistent in that the Employer had attempted to justify the requirements, while at the same time deleting them, and also offering to re-advertise with some of the offending duties deleted and some remaining. The Employer responded by requesting an extension stating that the necessary documents had not arrived from Italy. It is unclear what documents the Employer was waiting for, as the NOF and FD were not based on failure to provide documents from or regarding the Alien, such as documents regarding the Alien's qualifications. The CO denied the request for extension and found the Employer's rebuttal deficient due to the inconsistencies in the attempts to rebut.

It has been held that an employer may both attempt to cure the deficiency and offer to re-advertise, should the attempt fail. *Ronald J. O'Mara, supra.* However, the offer to re-advertise cannot be equivocal. This was not the case here. The Employer's offer to re-advertise did not correct the deficiency in that it kept certain of the offending duties in the advertisement. At the same time, the Employer attempted to amend the ETA 750A to delete some of the requirements. Further, another attempt to submit a draft advertisement and to amend the ETA 750A was submitted with the request for review. (AF 9-12). Again, the draft advertisement contained the duty to "serve meals." The ETA 750A deleted the duty of "prepare meals" and knowledge of food preparation, storage, and nutrition requirements. Even this belated attempt to cure fails to address the deficiency.

As such, the Employer has failed to justify the deficiencies with business necessity. The Employer's offers to re-advertise did not cure the deficiencies, as they did not delete all of the restrictive requirements. The CO's confusion as to the attempts to cure in the rebuttal were based on the Employer's inconsistent statements. The Employer

has failed to prove that the job opportunity does not contain unduly restrictive job requirements and as such, labor certification was properly denied.

ORDER

The CO's denial of labor certification is hereby **AFFIRMED.**

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of Alien
Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400 North
Washington, DC 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.